IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

GEORGIACARRY.ORG, INC., and DAVID JAMES,	)	
Plaintiffs,	)	CIVIL ACTION FILE NO.
v.	)	4:14-CV-139-HLM
U.S. ARMY CORPS OF ENGINEERS and JOHN J. CHYTKA, in his official capacity as Commander, Mobile District, U.S. Army Corps of Engineers,	)	
Defendants.	)	

DEFENDANTS' OPPOSITION TO PLAINTIFFS'
MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Defendants U.S. Army Corps of Engineers ("Corps") and John J. Chytka, Commander of the Corps' Mobile District (collectively, "Defendants") respectfully submit this opposition to Plaintiffs' motion for preliminary injunction. Plaintiffs' motion asks this Court to enjoin the Corps from enforcing its long-standing restriction on the presence of firearms on Corps-managed recreation areas. As set forth in more detail below, the Corps regulation at issue ensures the public safety of visitors and Corps personnel in these busy, crowded recreation areas. Entering the injunction Plaintiffs seek will upset that balance, when there is no evidence of irreparable harm; when Plaintiff James has been using these Corps-managed lands for years with this regulation in place; and where there is no binding legal authority compelling such an injunction. The balance of preliminary injunctive relief factors favors the government, and Plaintiffs' motion should therefore be denied.

BACKGROUND

The Corps receives millions of visitors per year to Corps-managed recreation areas located on water resource development projects administered by

the Corps. The area located near Lake Allatoona, in northwest Georgia, receives over 6 million visitors per year. Compl. ¶¶ 18, 20.[1]

Federal regulations govern the public use of Corps-managed water resource development projects. See 36 C.F.R. Pt. 327. To provide for "more effective recreation-resource management of lake and reservoir projects," the Corps issued regulations in 1973. 38 Fed. Reg. 7,552, 7,552 (March 23, 1973). As amended, the regulation entitled "Explosives, firearms, other weapons and fireworks" provides:

> (a) The possession of loaded firearms, ammunition, loaded projectile firing devices, bows and arrows, crossbows, or other weapons is prohibited unless:
>
> (1) In the possession of a Federal, state or local law enforcement officer;
>
> (2) Being used for hunting or fishing as permitted under § 327.8, with devices being unloaded when transported to, from or between hunting and fishing sites;
>
> (3) Being used at authorized shooting ranges; or
>
> (4) Written permission has been received from the District Commander.
>
> (b) Possession of explosives or explosive devices of any kind, including fireworks or other pyrotechnics, is prohibited unless written permission has been received from the District Commander.

36 C.F.R. § 327.13.

[1] Any cited statements from Plaintiffs' complaint are presumed to be correct solely for purposes of this Opposition.

Plaintiff David James, a Georgia resident, "frequently camps and recreates on Corps property and facilities at Lake [Allatoona]," a Corps project and water facility located in Northwest Georgia. Compl. ¶¶ 17-18. Plaintiff James is a member of GeorgiaCarry.Org, Inc., a non-profit corporation, which is also a named plaintiff. Id. ¶ 4. On June 12, 2014, Plaintiffs filed this case, contending that the application of the Corps firearms regulation to Plaintiff James while visiting the Lake Allatoona project violates the Second Amendment. See id. ¶ 35.

ARGUMENT

I. Plaintiffs Are Not Entitled to the Extraordinary and Drastic Remedy of a Preliminary Injunction.

A preliminary injunction is an "extraordinary and drastic remedy," Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc), that is "never awarded as of right." Winter v. Natural Res. Def. Council, 555 U.S. 7, 24 (2008) (citation omitted). A party seeking preliminary injunctive relief must produce evidence demonstrating: (1) a substantial likelihood of success on the merits of its claims; (2) that the plaintiff will suffer irreparable injury unless an injunction is issued; (3) that the threatened injury to plaintiff outweighs any harm the proposed injunction might cause the non-moving party; and (4) that the requested injunction would not be adverse to the public interest. Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp., 715 F.3d 1268, 1273-74 (11th Cir. 2013). Because a preliminary

injunction is such an "extraordinary and drastic remedy," it is "not to be granted unless the movant [has] clearly established the burden of persuasion as to each of the four prerequisites." Siegel, 234 F.3d at 1176 (citation and internal punctuation omitted). A plaintiff's failure to show any of the four factors is "fatal." ACLU of Fla. v. Miami-Dade Cty. Sch. Bd., 557 F.3d 1177, 1198 (11th Cir. 2009).

A. Plaintiffs Have Failed to Demonstrate a Substantial Likelihood of Success on the Merits.

A moving party's failure to demonstrate a "substantial likelihood of success on the merits" may defeat the party's claim, regardless of the party's ability to establish any of the other elements. See Church v. City of Huntsville, 30 F.3d 1332, 1342 (11th Cir. 1994). Plaintiffs have failed to demonstrate that they are substantially likely to succeed on the merits of their claim that the firearms restriction at issue here – which governs only property owned and managed by the Corps, rather than a private home owned by Plaintiff James – violates the Second Amendment.

1. The Corps Regulation Is Constitutional.

The Eleventh Circuit has explained that in analyzing Second Amendment claims, "[l]ike our sister circuits, we believe a two-step inquiry is appropriate: first, we ask if the restricted activity is protected by the Second Amendment in the first place; and then, if necessary, we would apply the appropriate level of scrutiny."

GeorgiaCarry.Org v. State of Georgia, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012), cert. denied, 133 S. Ct. 856 (2013). Initially, because the Corps regulation is a "law[] forbidding the carrying of firearms in [a] sensitive place[]," District of Columbia v. Heller, 554 U.S. 570, 626 (2008), it addresses conduct that falls outside the scope of the Second Amendment's protection. See United States v. Marzzarella, 614 F.3d 85, 91-92 (3d Cir. 2010) (concluding, after extensive analysis, that the presumptively lawful regulatory measures identified in Heller concern "exceptions to the right to bear arms" to which "the Second Amendment affords no protection"), cert. denied, 131 S. Ct. 958 (2011); see Declaration of Stephen Austin ¶ 9 (attached as Ex. 1) (explaining why the Corps lands at issue here are sensitive places).

In any event, even if the Corps regulation did implicate Plaintiff James' Second Amendment right, the regulation is constitutional. As a preliminary matter, even if the Court were to find that the Corps regulation implicates Second Amendment protections, it need not engage in heightened constitutional scrutiny. "[N]ot every limitation or incidental burden on the exercise of" a constitutionally-protected right "is subject to a stringent standard of review." Bullock v. Carter, 405 U.S. 134, 143 (1972) (citation omitted). As the Second Circuit has explained, "heightened scrutiny is triggered only by those restrictions that (like the complete

prohibition struck down in Heller) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes)." United States v. DeCastro, 682 F.3d 160, 166 (2d Cir. 2012), cert. denied, 133 S. Ct. 838 (2013). Here, as applied to Plaintiff James, the Corps regulation only pertains to his carrying of firearms on designated federal property; in addition, these firearms restrictions apply only to his occasional recreational visits to Corps-managed public land, and thus do not represent a substantial burden. Because the Corps regulation does not come close to the complete prohibition at issue in Heller, the Court need not employ heightened scrutiny to uphold the regulation.

Even assuming that heightened scrutiny were to apply, however, the Corps regulation passes constitutional muster. "It is a long-settled principle that governmental actions are subject to a lower level of [constitutional] scrutiny when the governmental function operating is not the power to regulate or license, as lawmaker, but, rather, as proprietor, to manage its internal operations." United States v. Kokinda, 497 U.S. 720, 725 (1990) (plurality opinion) (citation omitted); see also Nordyke v. King, 681 F.3d 1041, 1044-45 (9th Cir. 2013) (en banc) (upholding county ordinance regulating sale of firearms "only on County property" against Second Amendment challenge, and citing Kokinda); United States v.

Dorosan, 350 F. App'x 874, 875 (5th Cir. 2009) (U.S. Postal Service's "restrictions on guns stemmed from its constitutional authority as the property owner" of the land to which the restriction applied), cert. denied, 559 U.S. 983 (2010).[2] Where, as here, the government is "acting in its proprietary capacity," its action is valid "unless it is unreasonable, . . . arbitrary, capricious, or invidious." Kokinda, 497 U.S. at 725-26 (citation and internal punctuation omitted).

The policy of the Secretary of the Army, acting through the Corps, is "to manage the natural, cultural and developed resources of each [Corps-managed] project in the public interest, providing the public with safe and healthful recreational opportunities while protecting and enhancing these resources." 36

[2] See also United States v. Masciandaro, 638 F.3d 458, 473 (4th Cir. 2011) (upholding, as constitutional, regulation prohibiting carrying or possession of loaded handguns in motor vehicles in national parks, and noting government's "substantial interest in providing for the safety of individuals who visit and make use of the national parks," explaining: "The government, after all, is invested with 'plenary power' to protect the public from danger on federal lands under the Property Clause. See U.S. Const. art. IV, § 3, cl. 2 (giving Congress the power to 'make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States')."), cert. denied, 132 S. Ct. 756 (2011); Eugene Volokh, Implementing the Right to Keep and Bear Arms for Self-Defense, 56 UCLA L. Rev. 1443, 1475 (2009) ("Nevertheless, there is both precedent and reason for allowing the government acting as proprietor extra power to restrict the exercise of many constitutional rights on its property. This suggests that separate government-as-proprietor standards may likewise be proper for the right to keep and bear arms, whether in government buildings, by government employees, in government-owned parks, in government-owned housing, and so on.") (footnote omitted).

C.F.R. § 327.1. The Corps must consider a number of factors when deciding whether the public interest is furthered by opening Corps-managed lands for recreation, and when developing rules for their recreational use. Austin Decl. ¶ 3. These rules require a delicate balancing of several of these factors, including the safety of visitors and of Corps employees; protection of natural, cultural, and developed resources; and promotion of recreational opportunities. Id. As part of this balancing of factors, the Corps has considered how to structure its firearms rules to ensure the safety of visitors to the lands it manages and Corps assets located on those lands. Id.; see also id. ¶ 9.

Large numbers of visitors frequently congregate in the recreational facilities of Corps-administered lands, including Lake Allatoona. Austin Decl. ¶ 4. The Corps has considered potential sources of conflict among visitors and has enacted rules aimed at minimizing any such conflict. Id. Some sources of conflict include alcohol consumption, visitors' preference for different types of music played at different sound levels, and the relative loudness of visitors' conversations. Id. Such problems are often more acute at Corps-managed recreational areas, as contrasted with U.S. National Park Service recreational areas, because of the higher concentration of visitors on Corps lands. Id.

Corps regulations are aimed at ensuring that inevitable conflicts that arise as a result of disagreements about how different visitors make use of Corps recreational areas are resolved as quickly and peacefully as possible. Austin Decl. ¶ 4. The Corps has reasonably concluded that the presence of a loaded firearm could far more quickly escalate tensions resulting from such disagreements, and present a significant threat to public safety, involving the potential use of deadly force against a visitor or a Corps Park Ranger. Id.

This balancing of factors has also included consideration of available law enforcement options. Austin Decl. ¶ 5. Corps Park Rangers are neither equipped nor trained to function as law enforcement officers because Congress has not authorized Corps employees to carry firearms, to execute search warrants, or to enforce any federal laws except for issuing citations for violations of regulations governing Corps-managed land. Id. ¶¶ 5-6. Corps Park Rangers are thus not authorized to enforce the restriction on firearms in Corps facilities such as Corps-operated power-generation plants. Id. ¶ 6; see 18 U.S.C. § 930. The Corps has also reasonably determined that allowing armed visitors on Corps-managed lands could create a chilling effect on the enforcement of Corps regulations, because Congress has not authorized Corps Park Rangers to be armed. Austin Decl. ¶ 6.

The Corps firearms regulation represents a balancing of these factors, and is premised on the Corps' determination that the public interest is furthered by restricting the possession of loaded firearms on lands the Corps manages, unless the firearms are being used in areas specifically designated for hunting or target shooting, or being carried by a law enforcement officer or a visitor who has received permission from the District Commander. Austin Decl. ¶ 8. Plaintiffs have not shown – and cannot show – that this regulation is "unreasonable, . . . arbitrary, capricious, or invidious." Kokinda, 497 U.S. at 726. Consequently, the Court should uphold the Corps regulation as a permissible regulation of the government's use of its own property.

Finally, even if this Court were to apply a more rigorous level of review, the Corps regulation would still pass constitutional muster. Courts addressing restrictions on the possession of firearms outside the home, such as the Corps regulation, have almost uniformly declined to apply a standard above intermediate scrutiny.[3] This includes courts in this Circuit. See GeorgiaCarry.Org, Inc. v.

[3] See Drake v. Filko, 724 F.3d 426, 435-36 (3d Cir. 2013) (applying intermediate scrutiny to law requiring showing of justifiable need to carry handguns in public), cert. denied, 134 S. Ct. 2134 (2014); Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 93-94 (2d Cir. 2012) (applying intermediate scrutiny to law requiring showing of proper cause to carry concealed handgun in public), cert. denied, 133 S. Ct. 1806 (2013); Woollard v. Gallagher, 712 F.3d 865, 874-83 (4th Cir. 2013) (applying intermediate scrutiny to state requirement that permit to carry, wear, or

Georgia, 764 F. Supp. 2d 1306, 1317-20 (M.D. Ga. 2011), aff'd on other grounds, 687 F.3d 1244 (11th Cir. 2012); United States v. Nowka, No. 11-474, 2012 WL 2862061, at *6-8 (N.D. Ala. May 10, 2012).

"Under an intermediate scrutiny standard, a regulation 'may be upheld so long as it is substantially related to an important governmental objective.'" GeorgiaCarry.Org, 764 F. Supp. 2d at 1318 (quoting Nat'l Parks Conservation Ass'n v. Norton, 324 F.3d 1229, 1244 (11th Cir. 2003)). "The fit between the government's objective and regulation need not be 'necessarily perfect, but reasonable'; the government need 'not necessarily employ the least restrictive means.'" Id. (quoting Bd. of Trustees of State Univ. v. Fox, 492 U.S. 469, 480 (1989)) (internal punctuation omitted).

Under intermediate scrutiny analysis, in order to advance its compelling interests in combating crime and protecting public safety, policymakers may need to make "predictive judgments" about the risk of dangerous behavior. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 665 (1994). Such judgments are entitled to "substantial deference" by the courts. Id. In addition, "[s]ound policymaking

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transport a handgun in public must be conditioned on showing of "good and substantial reason"), cert. denied, 134 S. Ct. 422 (2013); Masciandaro, 638 F.3d at 470-71 (applying intermediate scrutiny to federal regulation prohibiting the possession of a loaded handgun in a motor vehicle on national park land).

often requires [policymakers] to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." Id. Moreover, "[t]he Constitution does not mandate a specific method by which the government must satisfy its burden under heightened judicial scrutiny." United States v. Carter, 669 F.3d 411, 418 (4th Cir. 2012). As the Supreme Court has explained, the "quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 391 (2000). The Court has upheld restrictions on speech, even under a strict scrutiny standard of review, in some cases relying "solely on history, consensus, and 'simple common sense.'" Florida Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995) (citations omitted); see also Milavetz, Gallop & Milavetz v. United States, 130 S. Ct. 1324, 1340 (2010) (rejecting notion that government must adduce evidence to justify restriction on speech and noting "[w]hen the possibility of deception is as self-evident as it is in this case, we need not require the State to conduct a survey of the public before it may determine that the advertisement had a tendency to mislead") (internal alterations and citations omitted). The Corps regulation must only satisfy this intermediate level of scrutiny and, as set forth below, it does so.

Here, the Corps undoubtedly has an important – indeed, compelling – interest in promoting order and public safety on the land it manages, and in protecting visitors from the risk of firearm violence. The Supreme Court has stated repeatedly that "the government's interest in preventing crime . . . is both legitimate and compelling." United States v. Salerno, 481 U.S. 739, 749 (1987) (citation omitted); see also Masciandaro, 638 F.3d at 473 (government has a substantial, even compelling, interest in "providing for the safety of individuals who visit and make use of the national parks," which include "area[s] where large numbers of people, including children, congregate for recreation").

The Corps' justification for this important regulation is neither novel nor implausible. As explained above, the Corps has developed rules governing visitors' access to Corps-managed lands that are designed to resolve potential sources of conflict among the large numbers of visitors who recreate on these lands. The Corps has reasonably determined that the presence of a loaded firearm on lands it manages has the potential to escalate tensions and pose a substantial threat to public safety. In addition, because Congress has not authorized Corps Park Rangers to carry firearms, the Corps has reasonably concluded that allowing visitors to carry arms on Corps-managed lands could create a chilling effect on Rangers' enforcement of Corps regulations. Thus, in order to fulfill its mission of

"manag[ing] the natural, cultural, and developed resources of each project in the public interest, [and] providing the public with safe and healthful recreational opportunities," 36 C.F.R. § 327.1, the Corps regulation restricts the possession of loaded firearms on Corps-administered lands (including Lake Allatoona) unless the firearms are being carried by a law enforcement officer, by a visitor with permission from the District Commander, or by a visitor using them in areas specifically designated for hunting or target shooting.

For the reasons stated above, the Corps regulation substantially relates to the indisputably important government interest of protecting the public and reducing violent crime. It therefore satisfies the requirements of intermediate scrutiny analysis. Plaintiffs thus cannot show that they would be likely to succeed on the merits of their claim that the regulation is unconstitutional.

2. Plaintiffs Misplace Their Reliance on Case Law That Does Not Materially Advance Their Claims.

The case law relied on by Plaintiffs does not show they are substantially likely to succeed on their claim that restricting firearms possession by an individual who camps temporarily on *government* property is unconstitutional. Mem. Supp. Pl. Mot. for Prelim. Inj. ("Pl. Mot.") at 5-7 [ECF No. 5-1]. Heller did not so hold. Indeed, Heller's first sentence makes clear the limited scope of that case's holding: "We consider whether a District of Columbia prohibition on the

possession of usable handguns *in the home* violates the Second Amendment to the Constitution." Id. at 573 (emphasis added). The respondent in Heller did not purport to be seeking the right to possess a firearm in a tent located on land owned by a third party, but simply "the right to render a firearm operable and carry it about his home in that condition only when necessary for self-defense." Id. at 576. Indeed, as the Eleventh Circuit has emphasized, "[t]he Court went to great lengths to emphasize the special place that the home – an *individual's private property* – occupies in our society." GeorgiaCarry.Org, 687 F.3d at 1259 (emphasis added). But the Corps-managed recreational area near Lake Allatoona is not Plaintiff James's private property. Given this important distinction from the factual circumstances in Heller, that case does not demonstrate that Plaintiffs are substantially likely to succeed on the merits.[4]

Moreover, the preliminary conclusion by the District of Idaho in Morris v. U.S. Army Corps of Engineers, _ F. Supp. 2d _, 2014 WL 117527 (D. Idaho Jan. 10, 2014) – that for Second Amendment purposes, a tent pitched on land not belonging to an individual should receive the same constitutional protection as a

[4] Additionally, Plaintiffs are simply incorrect that McDonald v. City of Chicago, 130 S. Ct. 3020 (2010), "struck down [a] total ban[] on keeping functional firearms in one's home." Pl. Mot. at 6. In fact, McDonald struck down no law; rather, the plurality opinion in that case held that the Fourteenth Amendment's Due Process Clause incorporated the right recognized in Heller. See id. at 3050.

private home – is in error. As Plaintiffs note, Morris's conclusion relied heavily on United States v. Gooch, 6 F.3d 673 (9th Cir. 1993), in which the Ninth Circuit concluded that an individual possessed a reasonable expectation of privacy in a tent pitched on a state campground, and thus a warrantless search of the tent violated the Fourth Amendment. Id. at 677. But Morris cited no authority supporting the proposition that the concerns at the heart of the Fourth Amendment (a citizen's legitimate expectation of privacy in his or her person, papers, and effects) relate in any significant way to the concerns at the core of the Second Amendment (self-defense). Nor did Morris cite any authority justifying the wholesale importation of substantive Fourth Amendment doctrine into Second Amendment jurisprudence. Different constitutional provisions do not necessarily have the same scope or substantive protections. Grafting substantive Fourth Amendment doctrines onto Second Amendment cases is problematic because "as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense." Masciandaro, 638 F.3d at 470.

In any event, a finding that Fourth Amendment privacy interests apply to a particular place does not end the inquiry as to whether the search or seizure at issue was unconstitutional. See, e.g., United States v. Rigsby, 943 F.2d 631, 637 (6th

Cir. 1991) (cursory search of defendant's tent and seizure of shotgun found therein were "valid based on the government's legitimate interests as weighed against any privacy expectation which defendant may have had in the tent"). In other words, the conclusion that an individual might have a reasonable expectation of privacy in a tent on government property does not resolve the issue of whether a search or seizure of that land would violate the Fourth Amendment. And by analogy, even if substantive Fourth Amendment doctrine were relevant here, starting from the bare premise that the Second Amendment might apply to a tent located on government property, it would not follow that a regulation related to firearms possession in that tent would violate the Second Amendment.

Thus, neither Heller nor Morris show that Plaintiffs are likely to succeed on the merits of their claim that the Corps' firearms regulation is unconstitutional as applied to Plaintiff James' possession of a firearm in a tent located on government-owned property.

Nor have Plaintiffs shown that they are likely to prevail on their claim that the Second Amendment prohibits the Corps from restricting the carrying of firearms on public lands that it owns and administers. Plaintiffs are simply incorrect that the only relevant issue is whether carrying a firearm on Corps-owned property lies outside the scope of the Second Amendment's protection. Pl. Mot. at

8. As explained above, the Eleventh Circuit employs a two-step inquiry in evaluating Second Amendment claims, and Plaintiffs have not shown they are likely to succeed under this inquiry.

Additionally, Plaintiffs' reliance on cases such as Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011), and Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012), is misplaced because those cases concerned firearms laws enacted by municipal and state legislatures in their respective capacities as lawmaking bodies, not (as here) as a proprietor of land. In any event, the laws at issue in those cases are readily distinguishable from the Corps regulation. In Ezell, the City of Chicago had mandated range training as a prerequisite to any firearms possession in the City, while simultaneously prohibiting all firing ranges within the City. 651 F.3d at 689-91. And the state law at issue in Moore prohibited every Illinois resident (with limited exceptions) from carrying a loaded and immediately-accessible firearm anywhere in the State of Illinois except for their permanent residences, fixed places of business, or on the property of someone who consented to the carrying of firearms. 702 F.3d at 934. The Seventh Circuit expressly noted that in contrast to Illinois' law – the only one of its kind in all fifty States – "when a state bans guns merely in particular places, such as public schools, a person can preserve an undiminished right of self-defense by not entering those places; since that's a

lesser burden, the state doesn't need to prove so strong a need." Id. at 940. The Corps' restriction on firearms possession on property it owns and manages is thus not comparable to a law prohibiting such possession in an entire State.

In short, Plaintiffs have failed to show that they are likely to succeed on the merits of their claims.

B. Plaintiffs Have Failed to Demonstrate That They Will Suffer Irreparable Injury Absent a Preliminary Injunction.

1. Plaintiff James' Frequent Use of Corps-Managed Facilities Without an Injunction in Place Undercuts Any Claim That Plaintiffs Will Suffer Irreparable Injury if Preliminary Injunctive Relief Is Not Granted.

"A showing of irreparable injury is the sine qua non of injunctive relief." Siegel, 234 F.3d at 1176 (citation and internal punctuation omitted). "Significantly, even if Plaintiffs establish a likelihood of success on the merits, the absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper." Id. (citations omitted). Furthermore, a plaintiff's unexplained delay in seeking relief may, "standing alone, . . . preclude the granting of preliminary injunctive relief . . . because the failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury." Mobile Cty. Water, Sewer & Fire Prot. Auth. v. Mobile Area Water & Sewer Sys., No. 07-

0357, 2007 WL 3208587, at *6 (S.D. Ala. Oct. 29, 2007) (quoting Tough Traveler, Ltd. v. Outbound Products, 60 F.3d 964, 968 (2d Cir. 1995)). Any delay by a plaintiff in seeking preliminary relief is a relevant factor when considering whether the plaintiff has met its burden to show irreparable harm.

Here, Plaintiffs' claim of imminent irreparable injury is undermined by the fact that Plaintiff James has frequently visited the Lake Altoona property, with the firearms regulation in place. Plaintiff James states that he "frequently camps and recreates on Corps property and facilities at Lake [Allatoona]," and "camps in a tent at the McKaskey Creek campsites, a Corps camping facility, several weeks per year." Compl. ¶¶ 17, 22. Plaintiff James does not represent that he ever sought preliminary injunctive relief before any of his visits to the Corps facilities. Indeed, despite this repeated and frequent use of Corps facilities with the Corps' firearms regulation in place, it was not until June 13, 2014, that Plaintiffs filed for a preliminary injunction. "Plaintiffs' delay . . . undermines plaintiffs' assertion of immediate, irreparable harm because plaintiffs are seeking a *change* in the status quo. . ." ACLU v. City of Las Vegas, 13 F. Supp. 2d 1064, 1083 (D. Nev. 1998) (emphasis in original).

The critical importance of irreparable injury derives from the fact that "[p]reliminary injunctions are issued to forestall imminent and irreversible injury

to the plaintiff's rights." Comic Strip, Inc. v. Fox Television Stations, Inc., 710 F. Supp. 976, 980 (S.D.N.Y. 1989). Consequently, "[d]elay in seeking enforcement of those rights . . . tends to indicate at least a reduced need for such drastic, speedy action." Citibank, N.A. v. Citytrust, 756 F.2d 273, 276 (2d Cir. 1985) (ten-week delay from notice); Gidatex, S.r.L. v. Campaniello Imports, Ltd., 13 F. Supp. 2d 417, 419 (S.D.N.Y. 1998) ("Courts typically decline to grant preliminary injunctions in the face of unexplained delays of more than two months."). Where the delay is significant, it "undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury." Citibank, 756 F.2d at 277 (citation omitted). "If the plaintiff has failed to prosecute its claim for injunctive relief promptly, and if it has no reasonable explanation for its delay, [a] district court should be reluctant to award relief." Natural Res. Def. Council v. Pena, 147 F.3d 1012, 1026 (D.C. Cir. 1998)). The fact that Plaintiff James has frequented Corps-managed lands for years without seeking preliminary injunctive relief beforehand shows that Plaintiffs will not suffer imminent irreparable harm if an injunction is not granted.

2. Plaintiffs Otherwise Fail to Demonstrate That They Will Suffer Irreparable Harm Absent Injunctive Relief.

Additionally, contrary to Plaintiffs' contention, merely alleging constitutional injury is not enough to demonstrate the likelihood of irreparable

harm. Though Plaintiffs quote a sentence from Cate v. Oldham, 707 F.2d 1176 (11th Cir. 1983), suggesting that such an allegation is sufficient, they fail to acknowledge that this sentence represents only a quotation from the district court decision that the Eleventh Circuit was reversing, not a statement of the relevant legal standard. See id. at 1188. Moreover, the Eleventh Circuit has specifically rejected the "conten[tion] that a violation of constitutional rights always constitutes irreparable harm," noting that "[o]ur case law has not gone that far." Siegel, 234 F.3d at 1177 (citing cases). Rather, "[t]he only areas of constitutional jurisprudence where we have said that an on-going violation may be presumed to cause irreparable injury involve the right of privacy and certain First Amendment claims establishing an imminent likelihood that pure speech will be chilled or prevented altogether. Id. at 1178. Here, as in Siegel, "[t]his is plainly not such a case."

Nor, finally, does Plaintiffs' bare assertion that financial compensation will not adequately remedy any alleged harm, Pl. Mot. at 9, suffice to demonstrate that they will suffer irreparable harm absent an injunction. Plaintiffs have thus failed to satisfy their burden on the second requirement of preliminary relief.

C. Granting the Requested Preliminary Relief Would Harm Defendants and the Public Interest.

"In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." Winter, 555 U.S. at 24 (citation and internal punctuation omitted). The harms to the public and the Corps if it is unable to enforce its firearms regulation include safety concerns for the unarmed Park Rangers and visitors, security problems for dams, levees, and hydropower facilities co-located within recreation areas, the inability to perform full safety and security evaluations to account for the presence of firearms, and the necessity to engage in the extensive rulemaking process required to promulgate new regulations. Austin Decl. ¶¶ 9-12.

Moreover, as noted above, Plaintiffs' extensive delay in seeking relief casts serious doubt upon their assertions that they will suffer imminent irreparable injury if they are not granted a preliminary injunction. And Plaintiffs' contention that they will be deprived of a constitutional right absent injunctive relief, Pl. Mot. at 10, fails because Plaintiffs have not shown that they are substantially likely to succeed on the merits of their constitutional claim. See Preminger v. Principi, 422 F.3d 815, 826 (9th Cir. 2005) (public interest did not support issuance of a preliminary injunction where plaintiffs failed to demonstrate a likelihood of success on the merits of their constitutional claim). And while Plaintiffs suggest

that recent Georgia legislation permitting greater latitude for the carrying of firearms in public bolsters their public-interest argument, Pl. Mot. at 10-11, that argument ignores the essential difference between the government acting in its role as legislator and acting as a proprietor of land that it owns and manages. Plaintiffs have thus failed to show that the balance of the equities favors them.

II. Non-Mutual Offensive Collateral Estoppel May Not Be Asserted Against the Federal Government.

Relying on Parklane Hosiery Company, Inc. v. Shore, 439 U.S. 322 (1979), Plaintiffs mistakenly contend that Defendants are collaterally estopped from raising legal issues similar to those at issue in a case in the District of Idaho. Pl. Mot. at 3-4. In thus contending, Plaintiffs fail to recognize that "Parklane Hosiery's approval of nonmutual offensive collateral estoppel is not to be extended to the United States." United States v. Mendoza, 464 U.S. 154, 158 (1984); see also Hercules Carriers, Inc. v. Claimant State of Fla., Dep't of Transp., 768 F.2d 1558, 1578 (11th Cir. 1985) (recognizing that in Mendoza, "the Supreme Court held that nonmutual collateral estoppel may not be invoked against the government."). Mendoza discussed numerous reasons why collateral estoppel does not and should not lie against the government. These reasons include, inter alia, the government's status as a far more frequent litigator than any other litigant; the frequency with which the government is involved in litigation over matters of great

public importance; the legitimate reasons successive administrations may decide to take different positions on issues from those taken by predecessor administrations; and the fact that a contrary rule would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Mendoza, 464 U.S. at 158-64. Because of Mendoza's clear holding, Plaintiffs' attempt to invoke collateral estoppel principles here fails.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion for a preliminary injunction.

Dated: July 14, 2014

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